SUPREME COURT OF THE UNITED STATES.

No. 312.

J. LOBRANO, PLAINTIFF IN ERROR,

vs.

J. NELLIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

INDEX.

	Original.	Print.
Petition	1	1
Citation	4	2
Sheriff's return	4	2
Answer	5	2
Order and continuance	6	3
Order and continuance	6	3
Subpœna duces tecum	7	3
Sheriff's return	8	3
Order and continuance	8	4
Order and continuance	8	4
Order and continuance	9	4
Order and continuance	9	4
Order and continuance	10	4
Statement of facts	10	5
Letter annexed to statement	12	5
Order, case submitted	13	6
Judgment	14	6
Motion for appeal	14	6
Bond of appeal	15	7
Certificate of the clerk Fifth District Court	17	7
Docket Supreme Court	18	7
Extract from the minutes Supreme Court	19	8
docket	19	8

	Original.	Print.
Opinion and decree Supreme Court	20	8
Dissenting opinion	25	10
Extract from the docket	29	11
minutes	29	12
Opinion and decree on rehearing	31	12
Dissenting opinion on rehearing	32	13
Petition for writ of error	38	15
Writ of error, order	40	16
Bond	41	16
Writ of error from United States Circuit Court	43	17
Citation	44	18
Sheriff's return	45	18
Certificate of the clerk	46	18
judge	47	19
clerk for legalizing	48	19

No. 994.

Transcript of Appeal.

Returnable in the Supreme Court of the United States on the first Monday of December, 1868.

Endorsed: Fifth District Court of New Orleans, State of Louisiana. James Nelligan, app't. vs. Jiacinto Dobrano, app'ee, No. 14434. Geo. L. Bright for appellant; C. Roselius for appellee. No. 994. Supreme Court of Louisiana. Filed June 19th, 1866. (Signed) L. J. Piseros, deputy clerk.

Fifth District Court of New Orleans, State of Louisiana.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO } No. 14434.

Petition filed July 8th, 1861.

To the honorable the judge of the 5th District Court of New Orleans:

The petition of James Nelligan, a resident of this city, respectfully shows, that Jiacinto Lobrano, a resident of the same place is indebted to him in the sum of nine hundred and fifteen dollars and 27 cents, with legal interest from 11th January, 1861, (date of default) until paid for this, to wit:

That your petitioner, being the owner of five lots of ground in the fourth district of this city in the square bounded by Washington avenue, Fourth, Laurel, and Constance streets, designated by
2 Nos. one to five, inclusive, on a plan drawn by Louis H. Pilie, city surveyor, dated the tenth day of January, 1860.—lots No. one to four, inclusive, measure each 32 feet front on Washington avenue by a depth of 129 feet between parallel lines; lot No. one forming the corner of Washington avenue and Laurel streets; lot No. 5 measures 32 feet one inch front on Washington avenue by a depth of 129 feet between parallel lines—caused them to be offered at pubic auction on Saturday, 5th January, 1861, by James B. Walton, esq., auctioneer, and they were adjudicated to Jiacinto Lobrano, he being the last and highest bidder, for the price and sum of four thousand one hundred and twenty-five dollars, being at the rate of eight hundred and twenty-five dollars per lot, on the following terms and conditions: The said Lobrano to assume the payment of eight mortgaged notes, dated 21st January, 1860, each for the sum of $379 16½, three hundred and seventy-nine 16½ dollars, of which four are payable
3 in one year and four payable in two years, bearing six per cent. per annum interest from date to maturity, and eight per cent. per annum thereafter if not punctually paid; and for the balance cash.

Your petitioner shews that the cash payment to be made by said Lobrano is nine hundred and fifteen dollars and 27 cents; that the aforesaid lots of ground have been tendered ta said Lobrano and he been put in default.

Wherefore your petitioner prays that the said Jiacinto Lobrano be cited to answer this petition and condemned to pay petitioner the aforesaid sum of $915 27, nine hundred and fifteen dollars and 27 cents with interest from 11th January, 1861, until paid, and costs.

Your petitioner prays for general relief.

(Signed) GEO. L. BRIGHT, *Att'y.*

Fifth District Court of New Orleans, State of Louisiana.

4 *Citation.*

Mr. Jiacinto Lobrano of New Orleans:

You are hereby summoned to comply with the demand contained in the petition which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the Fifth District Court of New Orleans in ten days after the service hereof.

Witness the Honorable H. D. Ogden, judge of the said court, the 8th day of July, in the year of our Lord, 1861.

JAMES NELLIGAN *vs.* JIACINTO LOBRANO. } No. 14434

(Signed) A. B. BERNOUDY, *Dep'y Clerk.*

Sheriff's return.

Received July 8th, 1861, and on the 11th day of July, 1861, I served a copy of the within citation and accompanying petition on the defendant herein, personally.

5 Returned same day.

(Signed) E. N. LEHMANN, *Dep'y Sheriff.*

Answer.—Filed 2nd November, 1861.

JAMES NELLIGAN *vs.* JIACINTO LOBRANO. } No. 14434.

The defendant now comes into court by his attorney, and for answer to the plaintiff's petition says, that he denies all and singular the allegations therein contained, so far as they have any tendency to give said plaintiff any right or cause of action against this respond-

ent; and for further answer he says, that the property referred to in said petition is subject to a legal mortgage in favor of the minor children for an amount exceeding its value; that the act of the legislature by virtue of which it is pretended said mortgage was
6 raised and cancelled, is unconstitutional, null and void; wherefore this respondent respectfully prays to be hence dismissed with costs; and he prays for all such other and further aid, relief and remedy as the nature of his case may require and the law will permit, and he will ever pray, &c., &c., &c.

(Signed) C. ROSELIUS.

Order and continuance.

Extract from the minutes, February 7th, 1861.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

This case, fixed this day for trial, was ordered by the court to be continued by preference, for want of time.

Order and continuance.

Extract from the minutes, February 18th, 1862.

7 JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

This case, fixed this day for trial, was ordered by the court to be continued by preference, for want of time.

Subpœna duces tecum.—Filed 22nd November, 1865.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

On motion of Geo. L. Bright, att'y for plaintiff, it is ordered by the court that the defendant, J. Lobrano, produce in court on the trial of this cause, to wit, on Thursday, 23rd November, 1865, the notice of J. Nelligan to J. Lobrano, dated March 22nd, 1861, and served on said Lobrano on 23rd March, 1861, a copy of which notice is now filed with this motion.

8 *Sheriff's return.*

Received 22nd November, 1865, and on the same day, I served a copy of the within rule on J. Lobrano, defendant, herein personally.

(Signed) B. ALBERT,
Dep'y sheriff.

Order and continuance.

Extract from the minutes, November 23rd, 1865.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

This case, fixed for trial for this day, was by consent ordered to be continued with preference.

Order and continuance.

Extract from the minutes, December 5th, 1865.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

9 This case, fixed for trial for this day was by consent of parties continued with preference.

Order and continuance.

Extract from the minutes, December 20th, 1865.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

This cause fixed for this day was, on motion, ordered to be continued with preference.

Order and continuance.

Extract from the minutes, Junuary 24th, 1866.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

This case, fixed for trial this day, was by consent of parties ordered to be continued with preference.

10 *Order and continuance.*

Extract from the minutes, Febuary 7th, 1866.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

This case, fixed for this day, was on motion of counsel ordered to be continued regularly.

Statement of facts.—Filed 5th April, 1866.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

The facts alleged in the petition are admitted.

It is further admitted that the property described in the petition was once the property of James Robb, and was subject to a tacit mortgage in favor of his children, he being their natural tutor.

It is admitted that James Robb having complied with the
11 provisions of act of the legislature approved March 16th, 1859, No. 133, the tacit mortgage in favor of his minor children was cancelled and annulled by order of the 2nd District Court of New Orleans, made prior to the alleged sale of plaintiff to defendant.

It is admitted that the minor children of James Robb have, since they became of the age of majority, settled with their father and have no mortgage against his property. This settlement was made after the alleged sale of plaintiff to defendant.

It is admitted that the property described in plaintiff's petition was after the sale to defendant, seized and sold by Jeannet Quertier & Co., to satisfy the mortgaged notes which Lobrano by his purchase had assumed to pay, as alleged in plaintiff's petition, in a suit instituted by them against the plaintiff.

It is admitted that when the suit was instituted by Jeannet Quartier & Co. against the plaintiff, he, the plaintiff, notified J.
12 Lobrano of said suit, by letter, a copy of which is hereto annexed.

New Orleans, April 5th, 1866.

(Signed) GEO. L. BRIGHT, *Counsel for pl'ff.*
(Signed) C. ROSELIUS, *For defendant.*

Letter of James Nelligan to Jiacinto Lobrano.—Filed 5th April, 1866.

NEW ORLEANS, *March 22nd*, 1861.

Mr. J. Lobrano, New Orleans:

You are notified that Messrs. Jeannet Quertier & Co., holders of four promissory notes described in the petition filed by them against me in the sixth District Court of New Orleans, has obtained a writ of seizure and sale, directing the sheriff to advertise and sell the property described in the act of sale annexed to their petition, passed before W. H. Peters, not. public, on January 27th, 1860.

The property is the same that was adjudicated to you by Jas. B. Walton, auctioneer, on the 5th of January, 1861, and the notes
13 sued upon are those that you assumed by the adjudication.

You are again requested to comply with the adjudication, and

notified that I will sue you for the damages I may suffer from your non-compliance.

Yours, respectfully,

(Signed) JAMES NELLIGAN.

Served a true copy of within on Mr. Lobrano personally.
March 23rd, 1861.
(Signed) JOHN L. KEARNEY.

Order case submitted.—April 5th, 1861.

JAMES NELLIGAN
vs.
J. LOBRANO. } No. 14434.

This case fixed for trial for this day was by consent of counsel submitted to the court for determination on the written statement of facts filed and briefs to be furnished within ten days.

Judgment.

14 J. NELLIGAN
vs.
J. LOBRANO. } No. 14434.

In this case, the court considering the law and the evidence to be in favor of defendant;

It is ordered and adjudged that there be judgment in favor of said defendant, Jiacinto Lobrano, and that plaintiff, James Nelligan, pay costs.

Judgment rendered 16th May, 1866.
(Signed) CHAS. LEAUMONT, *Judge.*

Motion for a suspensive appeal.—Filed May 25th, 1866.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 14434.

On motion of Geo. L. Bright, att'y for the plaintiff, and on his stating to the court that he believes that there is error to his
15 prejudice in the judgment rendered in the above entitled suit on the 16th day of May, 1666—

It is ordered, that a suspensive appeal be allowed to the plaintiff, James Nelligan upon his giving bond in the sum of two hundred dollars conditioned as the law directs, and that the appeal be returnable to the Supreme Court of Louisiana on the last Monday of June, 1866.

Bond.—Filed May 25th, 1866.

THE STATE OF LOUISIANA:

Know all men by these presents, that we, James Nelligan and Joseph Elliott are held and firmly bound unto Jiacinto Lobrano, his executors, administrators and assigns, in the sum of two hundred, $200 dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents. Sealed
16 with our own seals, and dated in the city of New Orleans, on this 25th day of May in the year of our Lord one thousand eight hundred and sixty-six.

Whereas the above bounden James Nelligan this day filed a motion of appeal from a final judgment rendered against him in the suit of J. Nelligan vs. J. Lobrano in the 5th District Court of New Orleans, on the 16th day of May, 1866.

Now the condition of the above obligation is such, that the above bound James Nelligan shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal, otherwise that the said Joseph Elliott, surety, shall be liable in his place.

[L. S.] (Signed) DR. J. ELLIOT,
Per E. RILLIEU.

[L. S.] (") GEO. L. BRIGHT.
Attorney for app'l't Nelligan.

Fifth District Court of New Orleans.

17 STATE OF LOUISIANA:

I, Louis Power, clerk of the Fifth District Court of New Orleans, do hereby certify that the above and foregoing seventeen pages do contain a true and correct transcript of all the proceedings had as well as of all the documents filed and evidence adduced on the trial of the cause wherein James Nelligan is plaintiff and Jiacinto Lobrano is defendant instituted in this court and now on the records thereof under the No. 14434.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, on this sixteenth day of June, in the year of our Lord one thousand eight hundred and sixty-six and in the ninetieth year of the independence of the United States of America.

[L. S.] (Signed) LOUIS POWEB, *Clerk.*

18 Supreme Court of the State of Louisiana.

Docket Book, Clerk's office, New Orleans, June 19th, 1866.

JAMES NELLIGAN, appellant,
vs.
JIACINTO LOBRANO, appellee. } No. 994.

GEO. L. BRIGHT,
Att'y for App'l't.
CHRISTIAN ROSELIUS,
Att'y for App'ee.

Filing record from 5th District Court of New Orleans, No. 14434.—Docketing.

Supreme Court of La.

Extract from the docket, May 6th 1866 :

JAMES NELLIGAN *vs.* JIACINTO LOBRANO. } No. 994.

Called. Fixed for 21st May, 1867.

Supreme Court of the State of La.

Extract from the docket, May 16th, 1867.
Filing 6 appellee's briefs.

19 Supreme Court of La.

Extract from the minutes, May 21st, 1867.

JAMES NELLIGAN *vs.* JIACINTO LOBRANO. } No. 994.

This case was this day called for trial. It was agreed by the parties that the case be submitted and that the plaintiff and appellant be allowed ten days to file briefs.

Ordered that the case be submitted and 10 days allowed to file briefs.

Supreme Court of La.

Extracts from the docket, May 31st, 1867.
Filing 7 appellant's briefs.

20 Supreme Court of the State of Louisiana.

Appeal from the 5th District Court of New Orleans.

J. NELLIGAN *vs.* J. LOBRANO. } No. 994.

CLERK'S OFFICE, NEW ORLEANS,
February 3d, 1868.

Mr. Justice Howell:

The question presented in this case is the constitutionality of an act of the legislature, approved March 16th, 1859, authorizing James Robb to sell his real estate, under certain formalities, free of the mortgage in favor of his minor children, and to invest the portion of the proceeds coming to said minors in certain lands, which are to be their property and not transferable during their minority.

It seems that plaintiff, having acquired some of this property, offered it for sale at public auction, when it was adjudicated to defendant. who afterwards refused to comply with the terms of the sale.

because, as he contends, the said statute is unconstitutional and
21 cannot defeat the vested rights of the minors on the property of Robb. The inquiry is, does the statute divest a vested right?

"The property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it. This general mortgage does not take effect when the tutor has given a special mortgage according to article 331." Civil Code 354.

"Minors * * * have a legal mortgage on the property of their tutors * * *, as a security for their administration, from the day of their appointment until the liquidation and settlement of their final account." C. C. 3282.

In 1830 a law was enacted permitting a national tutor to give a special mortgage on immovable property for the security of the rights and property of his children and the faithful discharge of his functions as tutor, which shall discharge all other property from mortgage or lien, and also authorizing the change of this special mortgage to other property. It also provided that in case of adjudication

to the father or mother of the property held in common with
22 the minor a special mortgage may be given, which shall have the effect of annulling the mortgage arising from such adjudication. The act of 1826, (p. 86,) provides for the distribution, pro rata, among the children, of the proceeds of the property subject to the mortgage arising from the adjudication, and directs that the shares accruing to the minors shall be placed in the hands of the tutor, to be administered according to the rules and principles governing the administration of minors property. The law has fixed the age of majority, but it permits a settlement with minors at an earlier date under certain circumstances and formalities, and it holds towards them locus parentiæ.

These provisions of the law have been cited to show that the mortgage in favor of the minor is simply a security for preservation of his rights and has always been considered under the control of the law-maker, that the nature or species of the security has been regulated and changed by legislative action and not deemed in conflict

with constitutional principles. The law-maker, acting for and
23 representing the minor, has provided and accepted one species of security as sufficient in his opinion, but he certainly has the right to say or agree or consent that another species will be sufficient and accept it for the protection of the minor's interests. The law regards the interests of the minor with paternal solicitude, and it is not to be presumed that it will design to lessen or jeopardize them. The right of the minor under the law, in this regard, is the right to security, which cannot be taken away; but this security may be changed in its character by the law-making power, without divesting a right. And this, in our opinion, is all that the legislature

has really effected or permited in the statute under consideration. Robb was authorized, under certain formalities, which it is admitted he has strictly observed, to sell his property on which the mortgage of his children rested, and was directed to invest the amount due them in other securities, which the legislature deemed sufficient;

which should discharge the mortgage of the minors on the
24 property so sold; and we cannot see that any right of the minors has been thereby divested. It was merely a commutation of security. They were still provided with security and there is nothing to show that they have any reason to complain; or it may be viewed as an investment of the minors' funds under legislative direction.

We therefore conclude that the statute is not unconstitutional, and that the property sold by plaintiff to defendant was not affected by the minors' mortgage, and this conclusion we think is sustained by the whole jurisprudence of the State touching this question, particularly since the passage of the acts of 1825 and 1830, re-enacted in 1855, on the subject of minors' mortgages. See Henne's Digest, p. 945, Commutation of minor's mortgage.

It is a principle of judicial action not to declare an act of the legislature unconstitutional when there is a doubt. Not having a legal ground for refusing to comply with the terms of the sale, defendant cannot claim any relief from the fact that the property has since been sold under a conventional mortgage which he assumed as a part of the price.

25 It is therefore ordered that the judgment appealed from be reversed and that plaintiff recover of defendant the sum of nine hundred and fifteen $\frac{27}{100}$ dollars, with legal interest from 11th January, 1861, and costs in both courts.

Dissenting opinion of Chief Justice Hyman.

On the 5th January, 1861, plaintiff offered for sale at public auction certain lots which were adjudicated to defendant. The terms of sale were that the purchaser should assume to pay, out of the sum at which the lots might be sold, a certain mortgage on them contracted by plaintiff, and should pay the balance which remained, after deducting the amount of the mortgage to be assumed, in cash.

Plaintiff, after putting the defendant in default, brought suit to recover of defendant the balance, payable in cash, amounting to $915,27.

Defendant resists the enforcement of payment, because the
26 lots were subject to a legal mortgage in favor of the minor children of James Robb.

It is admitted by plaintiff that the lots once belonged to Robb, and that there was a mortgage on them in favor of his minor children; but plaintiff contends that this mortgage, before the lots were offered for sale by him, had been released and that they were unincumbered with the mortgage when they were sold because Robb had complied, previous to the offering the lots for sale by plaintiff, with the provi-

sions of an act of the legislature of the State entitled "an act for the relief of James Robb and his minor children," approved March 16th, 1859.

Robb complied with the provisions of the act, sold the lots, and by order of the second District Court of New Orleans the mortgage on them in favor of Robb' minor children was cancelled and annulled, before plaintiff offered them for sale.

The act of the legislature authorized Robb, under certain formalities, to sell his property, and declared that on the sale by Robb
27 of his property the mortgage of his minor children thereon be discharged.

A mortgage is a right granted to a creditor over the property of his debtor for the security of his debt and gives him the power of having the property seized and sold in default of payment. C. C. 3245.

The mortgage also gives the right to the mortgage creditor to be paid out of the proceeds of the sale of the property mortgaged in preference to ordinary creditors.

A mortgage is a vested right, and cannot be divested by the legislative power of the State, unless for purposes of public utility and for adequate compensation previously made.—See 11, R. R.—10 Rob, Rep. 63.—Constitution 1852, art. 105; also Constitution 1864, art. 109.

It is admitted by defendant that since the institution of this suit Robb has settled with his minor children who have become majors. and that their mortgage does not now exist on the lots, and plaintiff contends that he must have judgment as the lots are now unencumbered with the minors' mortgage.

28 This position would be correct had not plaintiff admitted that the lots had been sold under the mortgage given by him on them subsequent to the adjudication to defendant, but previous to the extinction of the mortgage in favor of Robb's children.

It is not denied that defendant had the right to refuse judgment so long as Robb's children had a mortgage on the lots, and until plaintiff could give him a title to them unencumbered with any other mortgages than the one by the sale he assumed to pay.

Plaintiff having lost the power, by the sale of lots under the mortgage contracted by him, to give defendant title and possession of them before they were unencumbered of Robb minors' mortgage, cannot recover.

I think that the judgment of the District Court, which is in favor of defendant, should be affirmed.

Endorsed: Supreme Court of La. Filed February 3d, 1868.
(Signed) M. P. JULIAN, *Dep'y Clerk.*

29 Supreme Court of La.

Extract from the docket, February 11th, 1868.
Filing 6 appellee's briefs for rehearing.

Supreme Court of La.

Extract from the minutes, Monday, March 30th, 1868.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 994.

It is ordered that a rehearing be granted herein, and the cause fixed, with preference, for oral argument at 11 o'clock a. m., on Monday, 13th April, 1868, and notice hereof served on counsel for both parties.

Supreme Court of La.

Extract from the minutes, Monday, April 13th, 1868.

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 994.

Argued on rehearing by Geo. L. Bright, esq., of counsel
30 for plaintiff; by C. Roselius, esq., of counsel for defendant, until three o'clock p. m., at which time it was ordered by the court to be continued over to to-morrow, at 11 o'clock a. m.

Supreme Court of La.

Extract from the minutes. Tuesday, April 14th, 1868:

JAMES NELLIGAN
vs.
JIACINTO LOBRANO. } No. 994.

The arguments in this case were this day resumed by C. Roselius, esq., of counsel for defendant; by Geo. L. Bright, esq., of counsel for plaintiff, was submitted to the court on the briefs and authorities filed.

31 Supreme Court of the State of Louisiana.

Appeal from the 5th District Court of New Orleans.

J. NELLIGAN
vs.
J. LOBRANO. } No. 994.

CLERK'S OFFICE, *New Orleans, June 23rd*, 1868.

Mr. Justice Howell:

After a careful consideration of the arguments, on the rehearing granted herein, a majority of the court have been unable to come to

a different conclusion from the one first arrived at, and for the reasons heretofore given.

It is ordered that our former judgment remain undisturbed.

(Signed) R. K. HOWELL,
Associate Justice.

We concur in the above decision.

(Signed) ZENON LABAUVE,
Associate Justice.

(Signed) JAMES G. TALIAFERRO,
Associate Justice.

32 *Dissenting opinion of Justice Ilsley.*

On a rehearing: In the first opinion rendered in this case, this court held that, notwithstanding the provisions in the Constitution of 1864 that no law shall be passed impairing the obligation of a contract, nor shall divested rights be divested. it was competent for the State legislature to permit the tacit general mortgage in favor of the minor children of James Robb, their natural tutor, to be extinguished, and other security to be substituted therefor.

The court considered that as the legislature stood in loco parentiœ towards the minors, it was peculiarly its province to regulate and change, at its option, the mode of preserving and securing the property of minors in the hands of their tutors, and this solution of the question is still maintained by a majority of the court.

As I concurred in the first opinion expressed by the court, and I have, upon further reflexion, reached a different conclusion, I
33 will state, as succinctly as possible, my reasons for differing now from a majority of the court.

The case, as presented, is this: On the 16th March, 1859, the legislature authorized James Robb to sell his real estate, under certain formalities, free of mortgage in favor of his minor children, and to invest the portion of the proceeds coming to the minors in certain bonds, which are to be their property, and not transferrable during their minority.

The plaintiff in this suit having acquired some of this property at Robb's sale, and afterwards sold it, the last purchaser refused to comply with the terms of sale, contending that the mortgage of the minors still affects it.

The term, vested right, would seem to be so comprehensible as to be hardly susceptible of any amplification; still, Merlin, in his Repertoire de Jurisprudence, verbo Droit, has defined "droit acquis" to be a right already acquired by or for any person, before the fact or the act opposed to him, to prevent his enjoyment of that right; and it is in that sense it is said "a right once acquired cannot be
34 taken from him who holds it, without his consent, and that no act of another can be permitted to affect a right so acquired."

The rights of the minors consisted, in this particular case, not merely in a prospective mortgage without substantial basis, but in

property held for them by their tutor, for which the law had, previous to the passage of the act of 16th March, 1859, accorded them a tacit mortgage on all the property of their tutor.

That property, and the mortgage to secure it, formed the vested rights of these minors, so that it is unnecessary to discuss the question whether a mere nominal mortgage, not having yet attached to a tutor's property, because he had so far received nothing for the minors, that nominal mortgage could, by legislative will, be regulated, modified, or even dispensed with, in future?

The code of 1808 conferred upon a wife a tacit mortgage on her husband's property "to indemnify her against the debts for which she became liable jointly with her husband from the day when the obligation was executed."

35 The code of 1824 prohibited wives from contracting such obligations, and consequently there could be no mortgage for that cause.

A marriage took place in 1818, and the wife contracted, in 1841, a debt jointly with her husband; and she, invoking the law in force at the time of her marriage, contended for her right of mortgage to indemnify her against the debt contracted by her, in 1841, with her husband.

This court solved this question in Waggaman vs. Zacharie, 8 Rob. 186, and the court said: "The wife had acquired no right under the old law, which, though prospective in its operation upon the matrimonial rights of the spouses, from the time of their marriage, cannot continue to govern their contracts, or at least the effect of their contracts, made after the promulgation of a law operating a change in the rights resulting therefrom. The new law may, without having a retroactive effect, regulate the effect of obligations contracted posterior to its promulgation, and change, at all times, the consequences

36 of eventual rights, which did not exist, or were not acquired, under the old law."

The Cour d' Appel D' Angers thought and ruled differently in a case nearly analogous to that just cited, and said: "Considering that Madam Delarue was married whilst the Coutume de Paris was in force, and she having stipulated for her indemnity, the mortgage that that law and the then jurisprudence allowed her, at the date of her marriage, it would be giving to the civil code a retroactive effect to divest her of that right."

Mrs. Delarue had contracted no debt until after the promulgation of the civil code, and the Court of Cassation, therefore, considering that she had acquired no substantial right, annulled the arrêt of the Court of Angers, thereby furnishing to our court a precedent for its ruling in the case in 8 Robinson's Reports.

The vested rights of no particular class of persons are excepted expressly from the general inhibition; and ubi lex non distinguit, nec nos debemus distinguere.

37 By the constitution of 1864, citizens are shielded from even legislative encroachments on their vested rights; and this should prove a coat of steel for those of helpless condition. Inca-

pacities and disabilities are creatures of the law, and they may be removed or modified in the way they were originally created, eadem-modo; but there is a marked difference between such removals and modifications, and the divesting, by legislation, acquired legal rights. The legislative will cannot be substituted for the consent of the owner of vested rights—to divest him of them by any provision of law posterior to that found in the organic law of 1864, even though such rights were derived from the law directly, and not from contract.

To contend that the vested or acquired rights of a minor are not divested when other rights, or something else, is substituted for them is simply to maintain the futility of the inhibition contained in the constitution.

Nothing but the consent of the owner of a vested right, be he major or be he minor—arrived at the age of majority or legally
38 emancipated—can divest him of it.

I am, therefore, of opinion that our first judgment should be set aside, and the judgment appealed from affirmed.

Mr. Chief Justice Hyman concurs.

Endorsed: Supreme Court of La. Filed June 23rd, 1868. (Signed) M. P. Julian, dep'y clerk.

Supreme Court of La.

Petition.

CLERK'S OFFICE,
New Orleans, June 23rd, 1868.

To the Hon'ble William B. Hyman, Chief Justice of the Supreme Court of the State of Louisiana:

The petition of Jiacinto Lobrano respectfully represents, that in the case of Nelligan vs. your petitioner, decided by the Supreme Court of the State of Louisiana against your petitioner, was involved the question of the constitutionality of a law of the State of
39 Louisiana, on the ground that it violates the Consitution of the United States, that the decision of the Supreme Court is that said law is constitutional, and disallows the right of your petitioner, set up under said Constitution; that he is desirous to prosecute a writ of error from said judgment of the Supreme Court of the Supreme Court of Louisiana to the Supreme Court of the United States, to operate as a supersedeas, on giving such bond and security as the law requires and your honors may fix, and that a citation in due form issue in the premises.

Wherefore your petitioner respectfully prays that your honor may be please to grant him said writ of error, returnable in the Supreme Court of the United States on the first Monday in December next, on giving bond and security in such sum as your honor may fix, and that said writ of error may operate as a supersedeas, and that a citation issue to the defendant in error, Nelligan.

And as in duty bonnd, &c.

(Signed) C. ROSELIUS,
Att'y for Petitioner.

40 *Order.—Writ of error.*

Let a writ of error from the judgment rendered by the Supreme Court in this case to the Supreme Court of the United States, to operate as a supercedas, be granted, on the petitioner and plaintiff in error giving bond, with good and sufficient security, in the sum of two thousand dollars, conditioned as the law directs, returnable in the said Supreme Court, on the first Monday in December next; and the defendant in error, Nelligan, be cited to answer said writ of error.

New Orleans, June 23rd, 1868.

(Sgned) W. B. HYMAN,
Chief Justice of the Supreme Court of the State of Louisiana.

Endorsed: Supreme Court of La. Filed June 23rd, 1868. Signed M. P. Julian, dep'y clerk.

41 Supreme Court of La.

Bond.

CLERK'S OFFICE,
New Orleans, June 24th, 1868.

Know all men by these presents that we, Jiacinto Lobrano, principal, and Alfred Philips, as sureties, are held and firmly bound unto James Nelligan in the full and just sum of two thousand dollars, to be paid to the said James Nelligan, certain, attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals, and dated this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately at the Supreme Court of Louisiana, holding sessions in and for the eastern district of Louisiana, in a suit depending in said Supreme Court, wherein James Nelligan, plaintiff, and Jiacinto Lobrano, defendant, judgment was rendered against the said Jiacinto

42 Lobrano, defendant, and the said Jiacinto Lobrano having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Supreme Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said James Nelligan, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next—

Now the condition of the above obligation is such, that if the said Jiacinto Lobrano shall prosecute said writ to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered and accepted 24th June, 1868, in the pres-

ence of W. B. Hyman, chief justice of the Supreme Court of the State of La.

[L. S.] (Signed) JIACINTO LOBRANO,
[L. S.] (Signed) P. p. C. ROSELIUS.
[L. S.] (Signed) ALFRED PHILIPS.

Endorsed: Supreme Court of La. Filed June 24th. 1868. (Signed) M. P. Julian, dep'y clerk.

43 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the Supreme Court of the State of Louisiana, and holding sessions in New Orleans, Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. Nelligan and J. Lobrano, and wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the Construction of a clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption, sp ecially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said J. Lobrano, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 25th of June, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.] D. URBAN,
Clerk of the United States Circuit Court for District of Louisiana.

Endorsed: Supreme Court of Louisiana. No. 994. J. Nelligan vs. J. Lobrano. Writ of error. Copy of writ of error lodged in the

clerk's office of the Supreme Court of Lonisiana, in pursuance the statute in such cases made and provided, this twenty-fifth day of June, anno Domini 1868. C. Roselius, attorney of plaintiff in error. Filed 25th day of June, 1868. M. P. Julian, Dep'y cl'k.

44 UNITED STATES OF AMERICA, *State of Louisiana*:

The President of the United States of America, to James Nelligan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at the City of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office at the Supreme Court of the State of Louisiana, holding sessions at New Orleans, wherein Jiacinto Lobrano is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

45 Witness my hand and seal at the city of New Orleans, this eighth day of October, 1868.

[SEAL.] (Signed) R. K. HOWELL,
Associate Justice of the Supreme Court of the State of Louisiana.

Sheriff's return.

Received October 12th, 1868, and on the 19th day of October, 1868, I served a certified copy of this citation to appear and show cause, on James Nelligan, defendant herein, personally.

Returned same day.

(Signed) For THOS. L. MAXWELL,
Sheriff Civil Courts, Parish of Orleans,
H. K. NIXON,
Dep'y Sheriff.

Endorsed: Supreme Court of La. Filed October 19th, 1868. (Signed) M. P. Julian, deputy clerk.

46 Supreme Court E. D. State of Louisiana.

Certificate of the clerk.

UNITED STATES OF AMERICA:

I, John F. Deane, clerk of the Supreme Court of the State of Louisiana, for the eastern district, do hereby certify that the foregoing forty-five pages, contain a true copy of the transcript of the proceedings had in the fifth District Court for the parish of Orleans, in a certain suit wherein James Nelligan was plaintiff and Jiacinto Lobrano was defendant, and also of the proceedings had in this Supreme

Court, on the appeal taken by said James Nelligan, which appeal is now on the files thereof, under No. 994.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at the city of New Orleans, this twenty-fourth day of October, anno Domini 1868, and in the 93rd year of the independence of the United States of America.

[SEAL.] JOHN F. DEANE, *Clerk.*

[5-cent stamp, cancelled.]

47 Supreme Court, E. D.

Certificate of the Judge.

UNITED STATES OF AMERICA, *State of Louisiana.*

I, J. G. Taliaferro, senior judge of the Supreme Court of the State of Louisiana, the chief justice being absent, do hereby certify that John F. Deane is clerk of the Supreme Court for the E. D.; that the signature of John F. Deane to the within certificate is in the proper handwriting of him the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal at the city of New Orleans this twenty-fourth day of October, anno Domini eighteen hundred and sixty-eight.

[SEAL.] JAMES G. TALIAFERRO,
Snr. Justice Supreme Court of Louisiana.

[5 cent stamp.]

48 Supreme Court of the State of Louisiana.

Clerk's certificate.

I, John F. Deane, clerk of the Supreme Court of the State of Louisiana for the E. D., do hereby certify that the Honorable J. G. Taliaferro is, and was at the time of signing the foregoing documents, the senior presiding judge of our Supreme Court, and that the signature affixed to the same is in the proper handwriting of him the said judge.

In testimony whereof I have hereunto set my hand and affixed the seal of this hon. court, at the city of New Orleans, this, the twenty-fourth day of October, anno Domini eighteen hundred and sixty-eight.

[SEAL.] JOHN F. DEANE,
Clerk Supreme Court State of Louisiana.

[5-ct. stamp.]

In the Supreme Court of the United States.

J. LOBRANO,
PLAINTIFF IN ERROR,
vs.
J. NELLIGAN,
DEFENDANT IN ERROR.

In error to the Supreme Court of the State of Louisiana.

BRIEF OF COUNSEL OF PLAINTIFF IN ERROR.

The defendant in error brought suit in the fifth district court of New Orleans, claiming from J. Lobrano, plaintiff in error, $915.27, the amount of a cash instalment of the price of certain real estate in New Orleans, which had been adjudicated at public auction to Lobrano, but which the latter refused to take and comply with his bid.

See petition, Rec., pp. 1 and 2.

To this petition Lobrano answered that he was not bound to take the property and pay the price, since the property was burthened with a legal mortgage in favor of minor children, of a greater amount than the value of the property, and that the act of the legislature by which it was pretended that such mortgage had been raised and cancelled was unconstitutional, null, and void.

See answer, Rec., pp. 2 and 3.

There was an agreed state of facts submitted to the court of the first instance.

See Rec., p. 5.

And the fifth district court of New Orleans gave judgment in favor of the defendant there, the plaintiff in error here.

See Rec., p. 6.

From that judgment, Nelligan, defendant in error here, appealed to the supreme court of Louisiana.

See Rec., pp. 6 and 7.

FACTS.

The facts in the case are as follows:

1. The real estate adjudicated at the auction sale to plaintiff in error, Lobrano, had once belonged to James Robb, and was subject to a (tacit) mortgage in favor of his (Robb's) minor children, as he (Robb) was their natural guardian or tutor.

See Rec., p. 5.

2. On the 16th March, 1859, the legislature of Louisiana passed an act entitled "An act for the relief of James Robb and his minor children," empowering Robb to sell the real estate owned by him in Louisiana on certain terms and conditions, and imposing on Robb certain duties, which, being fulfilled, the sale of the real estate should be a discharge of the mortgage existing in favor of the minor children.

See Acts La. Legislature, 1859, pp. 104-5.

3. James Robb complied with all the requirements of this act; thereupon the mortgage in favor of the minor children was cancelled and annulled by order of court *before* the adjudication at auction of the real estate, here in question, to plaintiff in error, Lobrano.

See Rec., p. 5.

4. Among the terms and conditions on which the property in question was adjudicated, on 5th January, 1861, to plaintiff in error, Lobrano, was one that, as part of the price, he should assume the obligation of paying eight promissory notes, secured by mortgage on the property, all dated 21st January, 1860, payable, four in one year, and four in two years, after date.

See Rec., p. 1.

5. These eight mortgage notes were held by the firm of Jeannet Quertier & Co., who, on or about the 22d March, 1861, instituted proceedings in the sixth district court of New Orleans on the notes against Nelligan, the defendant in error, and obtained an order for the seizure and sale of the mortgaged property which had been adjudicated to plaintiff in error, Lobrano, which was sold under said order.

See Rec., p. 5.

6. Nelligan notified Lobrano that this suit on the eight mortgaged notes had been instituted.

See Rec., p. 5.

7. *After* the adjudication of the property at auction to Lobrano, the plaintiff in error, the minor children of James Robb became of age, settled with their father, the guardian, and ceased to have any claim against the property.

See Rec., p. 5.

On these facts arises the question whether the judgment of the supreme court of Louisiana in favor of the validity of the act of the legislature of that State of 16th March, 1859, (Acts, pp. 104, 105,) is not erroneous, on the ground that this act is repugnant to the Constitution of the United States.

POINTS.

This question must be answered in the affirmative.

1. "No State shall pass any law impairing the obligations of contracts."

U. S. Const., Art. I, Sec. 10, § 1.

2. In Louisiana, the father gives no security for the fidelity of his administration of the minors' property.

C. Code, La., Art. 330.

3. The tutor cannot alienate the real property of a minor,

except when a judgment against the minor is to be paid, or a joint owner demands a division.

C. C., La., Art. 339.

The property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it.

C. C., La., Art. 354.

That is to say, in order to secure the rights of the minor, the law of Louisiana declares that tutorship imports a mortgage on the property of the tutor in favor of the minor; the existence of the mortgage is an essential element of the relation between the tutor and the minor, constituted solely for the benefit of the latter, and existing "tacitly;" that is, even without notice to the world by record in the mortgage office. (La. C. C., Art. 3,279.)

4. The tutor and minor stand in relation to one another as parties to a contract of the species where the obligation is contracted by the obligor (tutor) without any express agreement on the part of the obligee (minor;) such as are imposed by the sole authority of law.

See C. C., La., Art. 2,271.
See Toullier, Book 3, Title 4, vol. 11, p. 2.
See Marcadé, vol. 5, p. 234.

5. The mortgage is a legal right on the property bound for the discharge of the obligation.

La. C. C., Art. 3,250.
" " 3,254.
" " 3,279.
" " 3,288.

6. Thus the obligation of the legal contract between James Robb and his minor children was, that he should faithfully administer their property; and to secure such faithful administration, they had a right of mortgage on all his property.

7. The act of the legislature of Louisiana impaired this obligation by relieving the property of James Robb from the mortgage, and leaving the minors without security.

"Any deviation from its" (the contract's) "terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, *or dispensing with the performance of those which are a part of the contract*,"—"impair its obligation."

3 Story on the Const., p. 250, § 1,379.

Rowlett *vs.* Shepherd, 1 La. (Miller) Rep., p. 94.

Sabatier *vs.* His Creditors, 6 Martin's (New Series,) La. Rep., p. 588.

Respectfully submitted.

THOMAS J. DURANT,
For Plaintiff in Error.

See Bomberger vs Clippinger
5th Watts & Sergeant. p. 134.
" Rogers vs Smith. 4th Barr
p. 97.
Thomas J. Durant.
for pff in error.

IN THE SUPREME COURT

OF THE UNITED STATES.

J. LOBRANO,

PLAINTIFF IN ERROR,

VS.

J. NELLIGAN,

DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Louisiana.

Brief of Counsel of Defendant in Error.

IN THE SUPREME COURT

OF THE UNITED STATES.

J. LOBRANO,
PLAINTIFF IN ERROR,
VS.
J. NELLIGAN,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Louisiana.

Brief of Counsel of Defendant in Error.

The Court is without jurisdiction.

It nowhere appears by the record that the repugnancy of a statute of the State to the constitution of the United States was drawn in question.

The question presented was whether the statute was contrary to the constitution of the State,—not of the United States. It nowhere appears that the Supreme Court of Louisiana considered any question relative to the constitution of the United States, nor that the question was ever raised in the State Court. It certainly never was decided.

The Court did not necessarily consider the constitution of the United States.

The article of the constitution of Louisiana is not similar to that of the constitution of the United States; that of Louisiana provides: "No ex post facto law, nor law impairing the obligation of contracts shall be passed, *nor vested rights be divested*, unless for purposes of public utility, and for adequate compensation previously made." That of the United States provides: "No State shall pass a law impairing the obligation of contracts." Under these constitutional provisions a law may be antagonistical to the constitution of the State, and not to that of the United States. In the case of Charles River Bridge vs. Warren Bridge. et al, 11 Peters, 540, the Court said: "It is clear that this Court has no right to pronounce an act of the State Legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the States from passing retrospective laws generally; but only ex post facto laws. See also 8 Peters, 413; 8 Peters, 110.

The writ of error should be dismissed.
The Victory, 6 Wal., p. 384.
Hamilton Company vs. Massachusetts, ib. p. 636.
Rector vs. Ashley, ib. 142.

But should the writ of error not be dismissed, we submit as follows:

On the 16th March, 1859, the General Assembly of the State of Louisiana enacted an act entitled "An act for the relief of James Robb and his minor children," thus:

No. 133) AN ACT.

For the Relief of James Robb and his minor Children.

Section 1st. Be it enacted by the Senate and the House of Representatives of the State of Louisiana, in general Assembly convened, that James Robb, of New Orleans, be and he is hereby authorised to sell the real estate owned by him in this State or any part thereof, on which the mortgage of his minor children rests on such terms as a family meeting of said minors, duly convoked, may advise, and upon the homologation of such advise and recommendation by the Second District Court of New Orleans the proceeds of such sale, or sales shall become the property of the children of said Robb, and so much thereof as shall be coming to the said minors, shall be invested as said family meeting may advise, subject to the approval of said Court in any of the bonds receivable by the State as security for the circulation of any of the banks established under the free banking law of this State, or in the first mortgage bonds of any of the Railroad Companies of this State, to which the State is a subscriber, and when said investment shall be effected, it shall be approved by the said Court on the petition of said Robb; and the said Court shall decree that the said bonds are the property of said minors and shall neither be assigned nor transferred during the existence of the usufruct of the said Robb of the same. The judge of said Court shall identify the said bonds with the judgment thus rendered by his paraph on the face of said bonds.

Section 2d.—Be it further enacted &c. That if the said property or any part thereof shall be sold for cash, so much of said cash, as may be coming to said minors, shall be deposited in court there to remain, and shall not be thence withdrawn except by order of the Court to be paid to the person from whom said bonds may be bought, if the said property or any part thereof be sold for mortgage notes in whole or in part, said notes shall be deposited in court, and shall not be thence withdrawn except on the recommendation of a family meeting, duly convoked and whose recommendation may be approved by said court in order to convert the same into said bonds and shall be the duty of said court so to order, that the conversion of said notes into bonds shall be under its own supervision. And bonds purchased or obtained under this section shall be paraphed as required in the first section, and shall not be assigned or transferred until the termination of the said usufruct.

Section 3d.—Be it further enacted &c. That the judgment of said court homologating the proceedings of the family meet-

ing under whose advice said property may be sold and the sale thereof shall discharge the mortgage of said minors on the property so sold, and the purchaser or purchasers of said property shall take the same free from any obligation on the part of such purchaser or purchasers to look to the investment of the price.

Section 4th.—Be it further enacted &c. That this act shall take effect from and after its passage.

WM. W. PUGH,
Speaker of the House of Representatives.
WM. F. GRIFFIN,
President of the Senate.

Approved March 16th, 1859.

ROBERT C. WICKLIFF,
Governor of the State of Louisiana.

James Robb sold the property and complied with the provisions of the act. The defendant in error being the owner of a piece of the property sold, sold to the plaintiff in error, and he refused to comply with his purchase upon the ground that the property is subject to a legal mortgage in favor of the minor children, that the act of the legislature by virtue of which it is pretended that said mortgage was raised and cancelled is *unconstitutional, null and void.*

The statement of facts contains the admission "that the minor children of James Robb have since they became of age of majority, settled with their father and have no mortgage against his property. The settlement was made after the sale to Lobrano.

This suit was instituted to recover the price of the sale.

The Supreme Court of Louisiana, decided in favor of the constitutionality of the law, granted a re-hearing and after argument ordered that their former judgment remain undisturbed.

The law is not contrary to the constitution of the United States.

The Constitution, Art. 1, Sec 10, No. 1, provides "no state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or *law impairing the obligation of contracts*, or grant any title of nobility."

In Louisiana the father is the natural tutor of his minor children, Civil Code art. 267. He is not required to give personal security for the fidelity of his administration. C. C. art. 330. But his immovable property is tacitly mortgaged in favor of the minor from the day of his appointment, as *security* for his administration and for the responsibility which results from it. C. C. 354. A mortgage is a right granted to the creditor over the property of his debtor for the security of his debt and gives him the power of having the property seized and sold in default of payment. C. C. 3245.

In Louisiana the mortgagee is not vested with the possession or ownership of the property. It can only exist on immovables. C. C. 3282. A privilege is a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages. C. C. 3153. Privileges therefore have not only the same effect as mortgages, but a greater one, for it entitles those that have them to be preferred before other creditors, even those who have mortgages. We make the comparison because if we should be unable to find an adjudged case about mortgages, we can find one about privileges.

If a law that changes or destroys a privilege be not a law impairing the obligation of contracts, neither can that which alters, amends or destroys a tacit mortgage, be a law impairing the obligation of contracts. A tacit mortgage arises from a statute, and so does a privilege. Neither can arise from the will of contracting parties.

In Slocking vs. Hunt, 3 Denio p. 274, the Court said: "The controversy was between creditors of the tenant. He owed each of them, and the struggle was for a preference in obtaining payment. Under the statute, (1 R. S. 746, §12), the landlord had the vantage ground, but the legislature of last winter thought that unreasonable, and repealed the enactment by which it was conferred. But this repealing statute did not impair the obligation of the tenant to pay rent, nor in the slightest degree interfere with it. He might still be sued; and his entire property was as much subject to execution and sale for the payment of this rent, since the repealing act was passed as before. The agreement of the tenant gave no such preference to the landlord, nor could it be construed in that way Here was the tenant's property, liable to be taken on execution by any of his creditors. These plaintiffs made such a levy, and so far had made themselves secure. But the revised statutes had given a preference to a landlord, over such execution creditors, and this was an undoubted right until the last session of the legislature. Other views then prevailed and the repealing statute declared that this preference should exist no longer. We hold that the legislature was fully competent to pass this statute; it did not touch the obligation of the tenant's contract. He was liable on it as before; the legislature only said that this extraordinary remedy, giving a preference to a landlord over an execution creditor, was unreasonable and should not be continued. * * * * * The question now before the Court

has no reference to the contract of the tenant. The statute does not assume to alter or modify that. The landlord may sue and enforce payment by judgment and execution, if property can be found. The repealing statute interposes no obstacle. It has merely deprived him of an advantage given to him by a former statute over execution creditors of the tenant. It has affected the relative rights of these creditors, but it has in no sense touched or impaired the obligation of any contract whatever."

In Tarpelay vs. Hamer, et al, 9 Smedes and Marshall, p. 313, the law had previously given to judgments the effect of a lien without *limit as to time and without condition.* The duration of the lien is now limited, unless the condition be complied with, and in that case it remains as it stood before. Such laws have universally been admitted to be valid. Jackson vs. Lamphire, 3 Peters, 280; 7 La. R. 301; Haywood vs. McCrackin, 2 How. S. C. 608."

In Oriental Bank vs. Freese, 6 Shepley, Maine 112, the Court said, the legislature must necessarily possess the power to determine by law, in what manner the person or property of a debtor shall be subjected to the demands of a creditor; and of making alterations in such laws as a change of circumstances, or the public good may require. And in doing this, one may be deprived of a right which he has by existing laws to arrest the body, or to attach, *or seize a certain description of property* without infringing on constitutional provision. Where a person, by the existing laws, becomes entitled to recover a judgment, or to have certain real or personal estate applied to pay his debt, he is apt to regard the privilege, which the law affords him, as a vested right, not considering that it has its foundation only in the remedy which may be changed, and the privi-

lege thereby destroyed. It was decided in Potter vs. Sturdivant, 4 Greenl, 154, that the legislature might mitigate the severity of a penalty, and award to the party injured as much as he deserved, in equity and good conscience, to receive. And in the People vs. Livingston, 6 Wendle 526, that the legislature possessed the power to take away, by statute, what was given by statutes.

In the case of Boon vs. Bowers, et al, 30 Miss. (1 Geo.) p. 254, the legislature authorized Dille, guardian of minors, to sell their lands, and required him, before executing any deed of conveyance, to execute a bond to secure his accountability to the minors. The Court decided that the act was constitutional.

29 Miss (8 Cush.) p. 186, it was decided that the legislature has the right to authorize a guardian to sell the minor's property.

24 Miss 24 Since the rights of the children are not vested rights they may be divested.

In New Orleans vs Holmes, 13 An. 503, it appears that the legislature enacted, that hereafter no inscription of a judgment rendered against the City of New Orleans, shall operate as a judicial mortgage against any property of the city. It was argued that the statute is unconstitutional, null and void, and impairs the obligation of contracts.

The Court said "there is nothing unconstitutional in the provision, that no inscription of a judgment against the city shall operate as a judicial mortgage, and it does not impair the obligation of contracts. The judicial mortgage resulting from the inscription of a judgment is no part of the contract upon which the judgment was based. Judicial mortgages are the mere creations of the law.

In 3 Kernan, N. Y., p. 302, it was decided that the act of abolishing distress for rent, affected previously made leases and was not unconstitutional.

In Swasey & Co. vs Steamer Montgomery, 12 La. An. R. p. 800, the Court said, privileges must be regulated by the law of the forum, and none can be claimed except such as are expressly granted in the Civil Code. See also Lee vs. His creditors, 2 La. An. 600. The question presented was whether a privilege conferred by a statute of Alabama should be recognized by the Court in Louisiana. From these decisions, that priviliges must be regulated by the laws of the forum, it necessarily follows that they form no part of the contract.

In Stanley vs Colt, 5 Wal, 169, it appears that Stanley devised his property to an Ecclesiastical Society and provided in his will that it should not be sold or disposed of, moreover there existed at the time a statute in Connecticut thus :

"That all such lands, tenements, heriditaments, and other estates, that either formerly have been, or hereafter shall be, given and granted, either by the General Assembly of this colony or by any town, village, or particular person or persons, for the maintenance of the *ministry of the Gospel* in any part of this colony or schools of learning, or for the relief of poor people, or for any other public or charitable use, shall forever remain and be continued to the use or uses to which such lands, tenements, hereditaments, or other estates, have been or shall be, given and granted, according to the true intent of the grantors, and to no other use whatsoever; and also to be exempted out of the general lists of estates, and free from the payment of rates."

The Eclesiastical Society petitioned the Legislature of Connecticut to authorize the sale of the lands. The Legislature authorized the sale, and directed the proceeds to be invested in good and sufficient funds and mortgages of real estate, provided that before any person shall proceed to make the sale

of said lands, or any part thereof, he shall become bound in good and sufficient bond to the Judge of Probate of the District of Hartford, conditioned for the faithful performance of his duty in the premises.

The sale was made. Colt having entered into possession, the heirs at law of Stanley brought ejectment against him for the premises. The Court said in England and in this country where a Court of Chancery exists, a charity of the description in question is a peculiar subject of the jurisdiction of that Court, and in cases of abuse, or misuse of the charity by the trustees or agents in charge of it, this Court will interpose to correct such abuses, and enforce the execution of the charitable purposes of the founder. So, by lapse of time, or changes as to the condition of the property and of the circumstances attending it, have made it prudent and beneficial to the charity to alien the lands, and vest the proceeds in other funds or in a different manner, it is competent for the Court to direct such sale and investment, taking care that no diversion of the gift be permitted. Lord Langdale, the master of the rolls, observed in Attorney-General vs. The South Sea Company, 4 Bevan, 458:

"It is plain that in ordinary cases a most important part of this duty is to preserve the property, but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this Court, upon various occasions, with a view to promote interests of charities, has not thought it necessary to preserve the property *in specie* but has sanctioned its alienation.

"This power, in the State of Connecticut, it appears is exercised by its legislature, as in the present instance. Many

acts of the kind have been referred to in the argument extending through a long series of years down to the present time.

"We cannot doubt that the power exists in the legislature, and it is not for this Court to revise the facts upon which it has seen fit to exercise it."

This cause bears a strong analogy to the one now before the Court, and the reasons which induced the legislature to enact the statute "for the relief of James Robb and his minor children," whereby he was authorized to invest the monies of his children in certain bonds are evident and sufficient, and in the words of the Court in Stanley vs. Colt, "it is not for this Court to revise the facts upon which it has seen fit to exercise it."

Such statutes have frequently been enacted by the Legislature of Louisiana.

As we have seen, by Art. C. C. 330, the minor originally had a tacit mortgage on all the immovable property of his tutor. In 1830 a law was enacted, Statute p. 46, providing that after the passage of the Act any surviving father or mother who shall have *heretofore* become or shall hereafter become the natural tutor or tutrix of their minor child or children, may and are permitted to give a special mortgage on immovable property for the security of the rights and property of said children and the faithful discharge of their functions as tutor or, tutrix. And from and after the execution of the special mortgage, all the remaining property of the father or mother shall be completely discharged from all legal, tacit or any other description of mortgages, hypothecation or lien whatever arising from said tutorship. And it further provided that the special mortgage may afterwards be shifted from one piece of immovable property to another.

This statute exists to the present time, is daily executed, and its constitutionality has never been questioned.

Such laws form no part of a contract. They provide a security for rights and have always been considered under the control of the law-maker.

The Robb statute does not postpone or accelerate the performance of any expressed or implied contract, imposes no new condition nor dispenses with the performance of any term—it destroys no new security but only substitutes as the Legislature supposed a better security than that granted by the general law. That it was a better security is evidenced by the admission that eventually Mr. Robb satisfied the rights of his minor children.

Mr. Story in his work upon the Constitution, § 1383, says. Much diversity of opinion has been exhibited upon another point,—how far the existing law enter into and forms a part of the contract. It has been contended by some learned minds, that the municipal law of a place where a contract is made forms a part of it, and travels with it wherever the parties to it may be found. If this were admitted to be true the consequence would be, that all the existing laws of a State, being incorporated into the contract, would constitute a part of its stipulations, so that a legislative repeal of such laws would not in any manner affect it. * * * * * It has therefore been judicially held by a majority of the Supreme Court, that such a doctrine is untenable. Although the law of the place acts upon a contract, and governs its construction, validity and obligation, it constitutes no part of it. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts. The Legislature may vary the

nature and extent of remedies, so always, that some substantive remedy be in fact left, may prescribe the times and modes in which remedies may be pursued; and bar suits brought within such periods, and not pursued in such modes. Statutes of limitations are of this nature, and have never been supposed to destroy the obligation of contracts, but to prescribe the times within which that obligation shall be enforced by a suit, and in default to deem it either satisfied or abandoned. * * * And a State Legislature may discharge a party from imprisonment upon a judgment in a civil case of contract, without infringing the Constitution; for that is but a modification of the remedy, and does not impair the obligation of the contract.

We have not ventured to draw the line of demarkation between the contract and the remedy. But should the Court think it properly drawn by the Chief Justice of Louisiana, in Johnson vs. Duncan, 3 Martin 355, we invoke it. He says "The one emanates from the will of the parties; the other is regulated by law."

The law making power provided a species of security for the minor. It has a right to change it or provide another as circumstances and time may require for the interest of the minor. This is all that the statute has effected. It provided a complete security as is shown by the result—a satisfaction of the obligation.

Respectfully submitted,

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